ONG KIM CHUAN & ANOR

v.

LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA

COURT OF APPEAL, PUTRAJAYA
HELILIAH MOHD YUSOF JCA
HISHAMUDIN MOHD YUNUS JCA
RAMLY ALI JCA
[CIVIL APPEAL NO: J-04-125-2006]
22 JUNE 2009

COMPANY LAW: *Directors - Personal liability - Whether directors of company jointly and severally liable for EPF contributions due and payable - Liability of directors, nature of - Employees Provident Fund 1991, ss. 46*

PROVIDENT FUND: *Arrears of contribution - Recovery of arrears of EPF contributions - Whether arrears recoverable by EPF as a civil debt - Whether directors of company jointly and severally liable for EPF contributions due and payable - Employees Provident Fund 1991, ss. 46, 65(1)*

PROVIDENT FUND: *Liability of employer - Directors of company - Whether directors of company jointly and severally liable for EPF contributions due and payable - Liability of directors, nature of - Employees Provident Fund 1991, ss. 46*

The first defendant – an employer as defined by s. 2 of the Employees Provident Fund 1991 ('the Act') – failed to make EPF contributions in respect of its employees. The 2nd and 3rd defendants (the appellants) were at all material times directors of the first defendant. The plaintiff claimed the contributions outstanding from all three defendants. However, when the first defendant was wound up, the plaintiff withdrew its claim against the first defendant and proceeded against the 2nd and 3rd defendants under s. 46 of the Act. The plaintiff consequently obtained summary judgment against the 2nd and 3rd defendants in the sessions' court. The 2nd and 3rd defendants appealed unsuccessfully to the High Court and thence to the Court of Appeal.

Held (dismissing the appeal with costs)
Per Ramly Ali JCA delivering judgment of the court:

(1) Under s. 65(1) of the Act, all contributions recoverable by the EPF are recoverable as a civil debt. In the instant case, the plaintiff's action against the appellant was based on s. 46 of the Act. Section 46 stipulates that directors of a company, are jointly and severally liable with the company for contributions due and payable to the EPF fund. Directors are thus liable jointly with their company or severally on their own. (paras 18 & 19)

(2) In the instant case, the liability of the appellants was based on s. 46 of the Act, not on common law, or any other written law. Section 46 stood by itself. The relevant period for liability under s. 46 to exist is "during such period in which contributions were liable to be paid", which in the present case was between June 2000 until March 2002; and October 2000 until May 2002. During these periods, the 1st defendant company was still in operation and both the appellants were the directors. The 1st defendant company was only wound up on 18 November 2002, and the appellants' directorship in the company ceased long after the relevant periods during which the said contributions were liable to be paid. Thus, the fact that the 1st defendant company had been wound up on 18 November 2002 did not in any way absolve the appellants from the liability imposed by s. 46. (paras 19 & 20)

(3) The liability under s. 46 on the appellants was created by statute 'directly' and 'personally' on the appellants as directors or former directors of the 1st defendant company. Thus the contributions due and payable became the debt of the appellants personally, jointly and severally with the company. Therefore, the appellants' argument that they were not personally liable for the debt of the company could not hold water. (para 21)

(4) There was nothing unlawful about the plaintiff proceeding against the appellants under s. 46 of the Act. The issue of the plaintiff having to file the proof of debt with the official assignee, as suggested by the appellant did not arise. Further, the issue of 'fraudulent preference under the Companies Act

1965' as alleged by the appellant did not also arise since the claim against both the appellants was based on their personal liabilities under s. 46 of the EPF Act. (paras 22 & 23)

Bahasa Malaysia *Translation Of Headnotes*

Defendan pertama – seorang majikan menurut tafsiran di bawah s. 2 Akta Kumpulanwang Simpanan Pekerja 1991 ('Akta') – telah gagal membayar caruman KWSP untuk pekerja-pekerjanya. Defendan-defendan kedua dan ketiga (perayu-perayu) pada semua waktu material adalah pengarah-pengarah defendan pertama. Plaintif menuntut caruman yang telah tertunggak di atas dari kesemua defendan-defendan. Bagaimanapun, ekoran penggulungan defendan pertama, plaintif telah menarik balik kes terhadap defendan pertama dan hanya meneruskan kes terhadap defendan-defendan kedua dan ketiga di bawah s. 46 Akta. Berikutnya, plaintif memperoleh penghakiman terus terhadap defendan-defendan kedua dan ketiga di Mahkamah Sesyen. Defendan-defendan kedua dan ketiga merayu ke Mahkamah Tinggi tetapi tidak berjaya, dan kerana itu telah merayu seterusnya ke Mahkamah Rayuan.

Diputuskan (menolak rayuan dengan kos)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Di bawah s. 65(1) Akta, semua caruman yang boleh dituntut oleh KWSP adalah boleh dituntut sebagai suatu hutang sivil. Dalam kes semasa, tindakan plaintif terhadap perayu-perayu adalah berdasarkan s. 46 Akta. Seksyen 46 memperuntukkan bahawa pengarah-pengarah sesebuah syarikat adalah bertanggungan secara bersama dan juga dengan syarikat atas caruman yang kena dibayar kepada KWSP. Maka pengarah-pengarah adalah bertanggungan sama ada secara bersama dengan syarikat ataupun secara bersendirian masing-masingnya.

(2) Dalam kes semasa, tanggungan perayu-perayu adalah berasaskan s. 46 Akta, dan bukannya undang-undang common atau mana-mana undang-undang bertulis lain. Seksyen 46 berdiri secara bebas. Tempoh masa relevan yang membangkitkan tanggungan di bawah s. 46 adalah "dalam masa tempoh yang di dalamnya caruman itu bertanggungan dibayar", yang mana, dalam kes semasa, adalah di antara Jun

2000 hingga Mac 2002; dan Oktober 2000 hingga Mei 2002. Dalam tempoh-tempoh ini, syarikat defendan pertama masih lagi beroperasi dan kedua-dua defendan adalah pengarah-pengarahnya. Syarikat defendan pertama hanya digulung pada 18 November 2002, sementara kedudukan perayu-perayu sebagai pengarah syarikat hanya berakhir lama selepas tempoh masa relevan di mana caruman-caruman kena dibayar. Oleh itu fakta bahawa syarikat defendan pertama telah digulung pada 18 November 2002 adalah dengan apa cara sekalipun tidak melepaskan perayu-perayu dari tanggungan yang dikenakan oleh s. 46.

(3) Di bawah s. 46, tanggungan ke atas perayu-perayu dikenakan oleh statut secara "terus" dan "peribadi" terhadap mereka selaku pengarah atau bekas pengarah defendan pertama. Ertinya, caruman-caruman yang tertunggak dan kena dibayar itu telah menjadi hutang peribadi perayu-perayu, secara bersama dan berasingan dengan syarikat. Oleh itu, hujah perayu-perayu bahawa mereka tidak bertanggungan secara peribadi ke atas hutang syarikat adalah tidak berasas.

(4) Tiada apapun yang tidak sah mengenai tindakan yang diambil oleh plaintif terhadap perayu-perayu di bawah s. 46 Akta. Isu bahawa plaintif harus memfailkan bukti hutang kepada Pegawai Pemegang Harta, seperti yang dikatakan perayu-perayu, tidak berbangkit. Begitu juga, isu 'fraudulent preference di bawah Akta Syarikat 1965' seperti yang didakwa perayu tidak berbangkit oleh kerana tuntutan terhadap kedua-duanya adalah berasaskan tanggungan peribadi mereka di bawah s. 46 Akta KWSP.

Case(s) referred to:
Salomon v. Salomon & Co Ltd [1897] AC 22 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 218, 292(1)
Employees Provident Fund Act 1991, ss. 2, 46, 65(1)
Subordinate Court Rules 1980, O. 26A

For the appellants - Dr Balasekaran; M/s Bala & Co
For the respondent - Dennis Yan Heen Khiong (Mohd Azizi Iskandar with him); M/s Ishak Sharif & Co

Reported by Andrew Christopher Simon

JUDGMENT

Ramly Ali JCA:

[1] This is an appeal by the appellants (the 2nd and the 3rd defendants in the original case) against the decision of the learned High Court judge in dismissing the appellants' appeal against the decision of the Sessions Court allowing the plaintiff's claim for summary judgment under O. 26A of the Subordinate Court Rules 1980.

Factual Background

[2] The 1st defendant, Haleywood Industries Sdn Bhd, was at all material times an employer as defined under s. 2 of the Employees Provident Fund Act 1991 (EPF Act).

[3] The 1st defendant had failed to make payment of EPF contributions in respect of its employees for the periods of June 2000 up to March 2002 and October 2000 up to May 2002 for a total sum of RM180,624.

[4] Both the 2nd and 3rd defendants (the appellants) were at all material times (during the relevant periods stated above) the registered directors of the 1st defendant.

[5] The 1st defendant was wound up on 18 November 2002.

[6] All the above facts are not in dispute.

[7] The plaintiff claimed for the said sum of RM180,624 initially from all the three defendants. However, since the 1st defendant was wound up on 18 November 2002, the plaintiff indicated (in its affidavit in reply – para. 3) its intention to withdraw its claim against the 1st defendant.

[8] The plaintiff proceeded its claim for the said amount against the 2nd and 3rd defendants (the appellants), under s. 46 of the EPF Act. The plaintiff obtained a summary judgment against the 2nd and 3rd defendants at the Sessions Court. The appellants' appeal to the High Court against the said decision was dismissed. Hence, the present appeal to this court.

[9] In the present appeal, the appellants argued that they were not personally liable for the debt of the 1st defendant company under s. 46 of the Employee Provident Fund Act 1991 because the appellants who were directors have lost their status or locus as directors when the 1st defendant company was been wound-up under s. 218 of the Companies Act 1965 and the official receiver has taken over the affairs of the 1st defendant company.

[10] Further it was also contended by the appellants that under s. 292(1) of the Companies Act 1965 in winding up of a company, any payment due under the Provident Fund or Employees Superannuation can be realized by filing the proof of debt with the official receiver.

[11] The appellants contended that s. 46 of the Act is not comprehensive to cover a situation where the company has been liquidated or wound up, and that the position of the directors' liability in such an event is not expressly provided for.

[12] The appellants also argued that the provision of s. 46 of the Employee Provident Fund Act 1991 applies only in respect of the company which is still in operation and the directors have not lost their status or locus as directors.

[13] The appellants also submitted that s. 46 of the EPF Act must be read conjunctively with the provisions of the Companies Act 1965 and that the directors cannot be held personally liable at law in respect of the debt of the company. To support this contention, the appellants relied on the strength of *Salomon v. Salomon & Co. Ltd* [1897] AC 22 – a judgment of the House of Lords which held that "the incorporation of the company created a separate person … and the members were not liable in respect of the company's obligations."

[14] Finally, the appellants stressed that the plaintiff's claim under s. 46 of the EPF Act for the said amount against the appellants tantamount to fraudulent preference under the Companies Act 1965 and thus unenforceable in law.

Findings Of Court

[15] It is not in dispute that the 1st defendant, Haleywood Industries, was at all material times an employer as defined under s. 2 of the EPF Act. It is also not in dispute that the 1st defendant had failed to pay contributions to the EPF for the said amount during the relevant periods; and during that periods, both the appellants were directors of the 1st defendant.

[16] Under s. 65(1) of the EPF Act, all contributions recoverable by the EPF can be recovered summarily as civil debt.

[17] The plaintiff's action against both the appellants is based on the provisions of s. 46 of the EPF Act which provides:

> where any sum of money by way of contributions together with any dividend due thereon remaining unpaid by a company, a firm or an association or persons, then, notwithstanding anything to the contrary in this Act or any other written law, the directors of such company including any persons who were directors of such company during such period in which contributions were liable to be paid, or the partners of such firm, including any persons who were partners of such firm during such period in which contributions were liable to be paid, or the office-bearers of such association of during such period in which contributions were liable to be paid, as the case may be, shall together with the company, firm or association of persons liable to pay the said contributions, be jointly and severally liable for the contributions due and payable to the fund.

[18] Under s. 46, it is crystal clear that directors of a company (including persons or former directors who were directors during such periods in which contributions were liable to be paid to the EPF) shall together with the company be jointly and severally liable for the contributions due and payable to the fund. These provisions are to be enforceable "notwithstanding anything to the contrary in any other written law".

[19] Being "jointly and severally liable" the said directors are liable either jointly together with the company or severally on their own independently of the company. In the present case, the plaintiff may choose to initiate its claim against the company (1st defendant) jointly with the two appellants (which was done initially) or to sue the appellants alone without the company

(which was done later when the plaintiff withdrew its claim against the 1st defendant after the 1st defendant was wound up). The liability of the appellants (as directors at the relevant times) is based on the provisions of s. 46 of the EPF Act above, not on common law or any other written law, not even the Companies Act 1965. Section 46 stands by itself "notwithstanding anything to the contrary in the EPF Act or any other written law"

[20] The liability on the appellants is created by statute ie, s. 46 of the EPF Act. The relevant period for such liability to exist is "during such period in which contributions were liable to be paid" which in the present case is between June 2000 until March 2002; and October 2000 until May 2002. During these periods, the 1st defendant company was still in operation and both the appellants were the directors. The 1st defendant company was only wound up on 18 November 2002, and the appellants' directorship in the company ceased long after the relevant periods during which the said contributions were liable to be paid. On that premise, the fact that the 1st defendant company had been wound up on 18 November 2002 does not in any way absolve the appellants from the liability imposed by s. 46.

[21] The liability under s. 46 on the appellants is created by statute 'directly' and 'personally' on the appellants as directors or former directors of the 1st defendant company. Thus the contributions due and payable become the debt of the appellants personally, jointly and severally with the company. Therefore, the appellants' argument that they were "not personally liable for the debt of the company" cannot hold water.

[22] The plaintiff had decided not to proceed with its claim against the 1st defendant company. Instead the plaintiff proceeded against the appellants as allowed under s. 46 of the EPF Act. The plaintiff has the right and choice to do so. There is nothing unlawful about that. That being the case, the issue of the plaintiffs filing the proof of debt with the official receiver after the 1st defendant company has been wound up, as suggested by the appellants, does not arise. The appellants reliance on the case of *Salomon v. Saloman & Co. (supra)* also does not help them in any way.

[23] Since the plaintiff's claim against both the appellants are on their personal liabilities under s. 46 of the EPF Act, not a claim against the 1st defendant company, then the issue of "fraudulent preference under the Companies Act 1965" as alleged by the appellants does not arise at all.

Conclusions

[24] Based on the above considerations, the court finds that the appellants' arguments to support their appeals are totally baseless and without merit. Therefore the court unanimously holds that the appeal is dismissed with costs of RM3,000 to be paid by the appellants to the plaintiff (respondent) here and the court below. Deposit to the account of the costs.